SABAH SHELL PETROLEUM CO LTD & ANOR A

v.

THE OWNERS OF AND/OR ANY OTHER PERSONS INTERESTED IN THE SHIP OR VESSEL THE 'BORCOS TAKDIR' B

HIGH COURT MALAYA, KUALA LUMPUR
NALLINI PATHMANATHAN J
[ADMIRALTY ACTION IN REM NO: D3-27-18-2006]
7 OCTOBER 2011 C

SHIPPING: *Action in rem - Admiralty jurisdiction - Damages to plaintiffs' offshore production platform caused by vessel - Application to declare security issued to plaintiffs in lieu of arrest of vessel inadequate and to effect an increase in quantum - Parties had consensual private agreement - Whether plaintiffs could seek to have sum varied upwards without consent of defendant providing indemnity - Whether court has jurisdiction to intervene and declare security afforded invalid - Whether application allowed* D

SHIPPING: *Action in rem - Admiralty jurisdiction - Damages to plaintiffs' offshore production platform caused by vessel - Security issued to plaintiffs in lieu of arrest of vessel - Power of court to vary or modify security - Plaintiffs found security given less than adequate - Whether warranted interference by court in its purported exercise of inherent jurisdiction - Whether there was abusive or oppressive conduct* E F

On 29 July 2004, a six inch underwater pipeline which was part of the plaintiff's offshore production platform located at St Joseph's oil field sustained damages when it was snagged and ruptured in the course of the Borcos Takdir ("the vessel") retrieving anchor. The damage to the pipeline came within the admiralty jurisdiction of this court and accorded the plaintiff the right, *inter alia*, to arrest the vessel if sufficient security were not provided in respect of the plaintiff's claim. Pursuant to negotiations undertaken between one Captain Tiong on behalf of the plaintiffs and the defendant's solicitors, security was provided on behalf of the defendant in the sum of US$10 million. The plaintiff maintained that it was only in the course of undertaking such repairs that the full extent of the costs incurred became apparent, which far exceeded the amount of security provided by the defendant. The plaintiff contended therefore that the security furnished did not reflect the plaintiff's reasonable best arguable G H I

A case and sought the intervention of this court to effect an increase in the quantum of security afforded to it. The plaintiff prayed for this court to declare (i) that the security of USD10 million provided by the defendant by way of a letter of undertaking be declared inadequate and that security be increased to USD 24 B million or such other reasonable amount deemed fit by the court and (ii) that the wording of the letter of undertaking dated 11 October 2004 provided by the Shipowners Protection Limited issued to the plaintiffs on behalf of the defendant *in lieu* of arrest was inappropriate and this court moderate or vary or modify such C terms as it deemed fit. The defendant, however, objected to this application, contending *inter alia* that the court lacked jurisdiction to grant interlocutory orders sought by the plaintiff. The defendant further argued that in the absence of abusive or oppressive conduct arising in this case, the court had no inherent jurisdiction D to intervene and moderate or vary the security provided.

Held (dismissing plaintiffs' application):

(1) This court cannot invoke express admiralty jurisdiction so as E to intervene and declare invalid or inadequate the security afforded in a situation where parties went into a consensual private arrangement between themselves such as the present case where the defendant had given directly to the plaintiff by way of undertaking an indemnity or guarantee from a third F party, P & I Club. This was not a situation relating to a bail bond, where the court may intervene in appropriate circumstances as borne out by case-law. The plaintiff here having agreed to the quantum of security in 2004, with the requisite knowledge and ability to assess the quantum of damages likely to arise, could not now seek to have that sum G varied upwards without the consent or agreement of the defendant and the third party providing such indemnity. (paras 23 & 28)

(2) The power of the court to control and thereby vary or modify H security arises from its inherent jurisdiction to prevent any abuse of the process of the court or the use of the court procedure in an oppressive way. There was no abusive or oppressive conduct arising in this instant case. The plaintiff had found the security given to be less than adequate. That I in itself did not warrant interference by this court in the

purported exercise of its inherent admiralty jurisdiction. This court could not re-write or substitute the private third party security arrangement reached between the plaintiff and the P&I Club on behalf of the defendant. The court thus lacked jurisdiction to intervene in this matter. (paras 30-33)

Case(s) referred to:
The Piya Bhum [1994] 1 SLR 564 ***(refd)***
"The Andria" [1984] 1 All ER 1126 ***(refd)***
Moschanthy [1971] 1 Lloyd's Rep 37 ***(refd)***
Sadit Timber Sdn Bhd & Anor v. The "Ling Yung" And "Thai Yung", Owners & Ors [1982] 1 LNS 116 HC ***(refd)***
The 'Arcadia Spirit'; Esso Singapore Pte Ltd v. 'Arcadia Spirit' (Owners Of) [1988] 1 LNS 89 HC ***(refd)***
The 'Benja Bhum' [1994] 1 SLR 88 ***(refd)***
The 'Polo II' [1977] 2 Ll LR 115 ***(refd)***
The "Clarabelle" [2002] 2 Ll LR 479 ***(refd)***
The Alleta [1974] 1 Ll LR 40 ***(refd)***
The Wladyslaw Lokietek [1978] 2 Ll LR 520 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 24(b)
Merchant Shipping (Liability of Ship Owners and Others) Act 1958, s. 5
Rules of the High Court 1980, O. 70 r. 15(1)

Supreme Court Act 1981 [UK], ss. 20(2), 21(2), (4)

For the plaintiff - Liew Teck Huat (Lim Qi Si with him); M/s TH Liew & Partners
For the defendant - Arun Krishnalingam (Matthew Kurien with him); M/s Sativale Mathew Arun

Reported by Suhainah Wahiduddin

JUDGMENT

Nallini Pathmanathan J:

[1] This is an application by the plaintiffs for a review of the security provided by the defendant in respect of its claim. In essence the plaintiff seeks an order from this court for the security provided to be increased. The defendant objects to any such increase in the provision of security.

[2] The precise prayers sought by the plaintiff are that:

(a) This court declare that the security of USD10 million provided by the defendant by way of a letter of undertaking be declared inadequate and that security be increased to USD 24 million or such other reasonable amount deemed fit by the court;

(b) That is court declare that the wording of the letter of undertaking dated 11 October 2004 provided by The Shipowners Protection Limited issued to the plaintiffs on behalf of the defendant *in lieu* of arrest is inappropriate and that this court moderate or vary or modify such terms as it deems fit.

Salient Facts

[3] The background facts are comprehensively set out in the plaintiff's submissions and I adopt the same. On 29 July 2004, a six inch underwater pipeline which is part of the plaintiff's offshore production platform known as SJJT-H located at St Joseph's oil field sustained damage when it was snagged and ruptured in the course of the Borcos Takdir retrieving anchor.

[4] The damage to the pipeline came within the admiralty jurisdiction of this court and accorded the plaintiff the right, *inter alia*, to arrest the vessel if sufficient security were not provided in respect of the plaintiff's claim. Pursuant to negotiations undertaken between one Captain Tiong on behalf of the plaintiffs and the defendant's solicitors, security was provided on behalf of the defendant by way of a Club Letter of Undertaking in the sum of US$ 10 million. Such security was provided in October 2004, some two months after the incident. The plaintiff contends that at the time the repair works necessitated had not even begun. As such the plaintiff maintains that it was not in a position to ascertain the extent of the loss suffered. The repair works were mobilised in November 2004, stopped due to the onset of bad weather and continued again in February 2005 until completion.

[5] The plaintiff maintains that it was only in the course of undertaking such repairs that the full extent of the costs incurred became apparent. And this sum far exceeded the amount of security provided by the defendant, even without the inclusion of interest and costs.

[6] The trial of this matter is complete and in its course, considerable evidence was tendered on the costs of repair. This element alone, based on the evidence of one Mr Sim Theng Hiok exceeds US$ 15 million. The plaintiff contends therefore that the security furnished does not reflect the plaintiff's reasonably best arguable case and seeks the intervention of this court to effect an increase in the quantum of security afforded to it.

The Plaintiff's Case

[7] In support of its application, the plaintiff points out that this court in the exercise of its admiralty jurisdiction retains an overriding power to supervise and ensure that security provided is adequate and fair to both parties. It has the power, the plaintiff contends to decide not only the quantum of security but also the form and wording to be used in the security document. The admiralty court which has the power to order the arrest and release of vessels retains the residual power to ensure that security provided is fair and reasonable and not oppressive or overreaching either way. Such jurisdiction it is contended is not merely statutory but inherent (see 'The Vasso' where the English Court of Appeal held, *inter alia*:

> ... In our judgment the purpose of the plaintiff in invoking the Admiralty jurisdiction cannot affect the existence of the jurisdiction. The jurisdiction is simply there. The Court has the power to arrest. But the exercise of the power is, as Order 75, r. 5(1) shows, not mandatory; the Court may decline to exercise it. Furthermore under 13(4) of O. 75 the Court has a discretionary power to order the release of property under arrest.

[8] The plaintiff then traced the basis for the provision of security *in lieu* of the arrest of a vessel, making reference to the provision of security in accordance with the Rules of the High Court, payment into court or providing security on terms acceptable to the arresting party, the plaintiff. Order 70 provides for the provision of security in the form of a Bail Bond as set out in form 164 under O. 70 r. 15(1) of the Rules of the High Court 1980. The plaintiff submitted that the most common objection in relation to bail bonds is the quantum or the upper limit of the same, whereby rules were adopted to fix the quantum of the security. In the *Moschanthy* [1971] 1 Lloyd's Rep 37 the court held that the plaintiff is entitled to security based on its reasonably arguable best case. The plaintiff maintains that if the court had no jurisdiction to intervene in relation to the issue of the quantum of security provided, these rules could not have developed.

[9] The plaintiff also relies on the case of *'The Piya Bhum* [1994] 1 SLR 564 where the defendant procured a bail bond from a Swedish P & I Club. The plaintiff sought to have the bail bond set aside. The plaintiff failed at first instance but on appeal the Singapore Court of Appeal held as follows:

> The owners of a ship may secure the release of their ship, if under arrest, or the restraint of her arrest, by providing a bail bond for an adequate amount in Form 164. The court has jurisdiction to decide on the quantum of the bond. The Court also has jurisdiction to vary the wording of the guarantee to protect the legitimate rights of the defendants: The Bulgaria. The court of course, cannot validate a worthless bail bond.

[10] The court drew a distinction between a bail bond and a guarantee.

[11] The plaintiff also relies on the case of 'The Bulgaria' where the defendant wished to modify the terms of the prescribed form of security on the exceptional circumstances that the ship belonged to a foreign state which declined to submit to jurisdiction. The court allowed the qualifying words to be added to the form but only on being satisfied that the plaintiff would not be prejudiced.

[12] The plaintiff then moves on to consider payment into court and the provision of alternative security such as a banker's guarantee or a letter of undertaking which is commonly afforded these days as a sensible and efficacious mode of resolving security disputes in this area of the law. The plaintiff contends that if the court has discretion to intervene where bail bonds are concerned but cannot do so in matters relating to other forms of security then this would be entirely absurd, resulting in parties insisting on bail bonds rather than alternative security. The plaintiff maintains that the court has the absolute discretion to settle the quantum and terms of alternative security between the parties (see *The 'Benja Bhum'* [1994] 1 SLR 88). In *The 'Pacific Charger' the New Zealand Court of Appeal* (unreported) reproduced at [1988] 3 MLJ 263, the court of first instances ordered the release of the defendants' vessel from arrest on providing security for NZ$7.5 million from the Britannia Steam Ship insurance Association Ltd. One of the terms of the order was that the wording of the guarantee was to be in terms settled by the Registrar. The New Zealand Court of Appeal held:

> ... there was no error in the judge's approach. In our view he exercised his discretion in accordance with the intention and spirit of the rule, nor has there been shown to be any principle of admiralty law which his decision could be said to be in conflict.

[13] This decision was accepted in the *'The 'Arcadia Spirit'; Esso Singapore Pte Ltd v. 'Arcadia Spirit' (Owners Of)* [1988] 1 LNS 89. And in the Singapore High Court decision in The "Inai Selasih", the plaintiffs arrested the vessel and refused to release it on provision of reasonable security, demanding instead extortionate sums of monies. The Malaysian owners of the vessel sought the intervention of the Singapore High Court asking it to exercise its supervisory jurisdiction. The court intervened and ordered the release of the vessel on the provision of security in a considerably lesser sum than that demanded. The court also settled the wording of the Banker's guarantee.

[14] In like manner therefore in the instant case, the plaintiff seeks the intervention of this court in the exercise of its inherent supervisory admiralty jurisdiction to vary the terms of the letter of undertaking so as to achieve fairness, namely by ordering an increase in the quantum of security to be provided. The plaintiff relies on, *inter alia,* the foregoing cases to make the submission that the court has jurisdiction to so increase the quantum of security between the parties.

The Defendant's Case

[15] The defendant strenuously objects to this application, contending *inter alia*, that the court lacks jurisdiction to grant the interlocutory orders sought by the plaintiff. The defendant points first to the admiralty jurisdiction of the High Court as expressly provided by statute, namely s. 24(b) of the Courts of Judicature Act 1964 and ss. 20(2) and 21(2) and (4) of the Supreme Court Act 1981. In the exercise of this express admiralty jurisdiction the plaintiff has the right to arrest a vessel as security for a maritime claim if the court has jurisdiction to hear and determine the claim and the requirements of O. 70 are complied with. Accordingly the defendant maintains that the orders sought in this application do not fall within the express statutory admiralty jurisdiction of the court.

[16] With regards to the inherent jurisdiction of the court, the defendant submits that the court does indeed have an inherent jurisdiction to prevent abuse of the admiralty jurisdiction of the

court. However such inherent admiralty jurisdiction it is contended, is limited to preventing any oppressive act or use by the plaintiff of his right to arrest, albeit by way of actual arrest or threat of arrest. (*The 'Polo II'* [1977] 2 Ll LR 115). In 'The Polo II' Brandon J who also heard the locus classicus, 'The Moschanthy' held as follows:

> ... The nature of the proceeding appears from *'The Moschanthy'* [1971] 1 Lloyd' s Rep 37, where a similar question arose. I took the view in that case that the Court had power to control the amount of security demanded by a Plaintiff in an action in rem and that the control should be exercised on the principle that a plaintiff was only entitled to demand such an amount as security as would cover his reasonably best arguable case, that is to say cover the amount of the claim, the amount of any interest that might be recoverable and the amount of any costs. And I took the view that the power of the court to control security in that way was derived from the inherent jurisdiction of the court to prevent any abuse of the process of the court, or the use of court procedure in an oppressive way. As I pointed out in that case the power to arrest a ship is a very drastic power. And the power to insist that she shall remain under arrest unless security of a certain amount is given is equally a drastic power, and my view, which I expressed in The Moschanthy and which I repeat now, is that that power must not be exercised oppressively, and if it is exercised oppressively then the Court can and should interfere to prevent conduct of that kind. At the same time the Court must make sure that the plaintiff is not left without sufficient security to cover his reasonably best arguable case ...

[17] The defendant therefore maintains that the inherent admiralty jurisdiction of this court serves to protect an abuse by the plaintiff of its right to arrest and demand security to preclude such arrest, upon proof of such abusive conduct. In determining whether there is abuse or oppressive conduct the rule as set out in "The Moschanthy" is that the plaintiff is entitled only to its reasonable best arguable case, plus interest and costs. This is a matter for the plaintiff to establish, not the defendant. This is because it is the plaintiff that is in a position to assess the costs and quantum which forms the basis for the demand for security. The defendant would not be in a position to assess this.

[18] Consequently the defendant argues that in the absence of abusive or oppressive conduct by the plaintiff the court has no inherent jurisdiction to intervene and moderate or vary the security provided.

Re-Arrest

[19] The defendant maintains that the plaintiff could and should have made a proper assessment of the costs of repair before demanding and agreeing to the sum of USD10 million which was duly provided by the defendant. They possessed the requisite information to make the assessment at the material time.

[20] As such the defendant maintains that if the plaintiff needs to increase its security this can only be done by way of re-arrest in this case. (*The "Clarabelle"* [2002] 2 Ll LR 479). This court, it is maintained, cannot compel the defendant to provide any form of security save in relation to the arrest of a vessel, where the court may impose as a condition to release, the provision of alternative security. That it is pointed out, is not the case here.

Letter Of Undertaking

[21] The defendant submits that the letter of undertaking in question was not given after the arrest of any of the defendant's ships. It was a contract between the plaintiff and a third party, namely the requisite P & I Club. This is distinguishable from a situation where a third party gives a bail bond to the court. As this is a contract between the plaintiff and a third party, the defendant maintains that the court has no jurisdiction *albeit* statutory or inherent to re-write or substitute a separate contract for that achieved by consensus between the parties. In short, their submission is that this court cannot re-write the contract so as to compel the third party to undertake a greater liability than that it agreed to voluntarily. (*Sadit Timber Sdn Bhd & Anor v. The "Ling Yung" And "Thai Yung", Owners & Ors* [1982] 1 LNS 116; The Alleta [1974] 1 L1 LR 40; The Alacrity [1994].

Decision

[22] I have considered the written and oral submissions tendered by learned counsel for the plaintiff and the defendant. This is an instance where the plaintiff seeks in effect to obtain a declaration that the agreed security granted by a third party P & I Club on behalf of the defendant to the plaintiff to be declared inadequate and for such security to be substituted with a significantly larger security by the third party at the behest of the court. Further it is sought that the court moderate or modify the wording of such security which was arrived at consensually by the plaintiff and the defendant through their respective agents.

[23] The first issue that arises for consideration is that of jurisdiction. I have outlined the arguments of both the plaintiff and the defendant above. It appears to this court that it cannot invoke express admiralty jurisdiction so as to intervene and declare invalid or inadequate the security afforded in a situation where parties went into a consensual private arrangement between themselves such as the present where the defendant has given directly to the plaintiff by way of undertaking an indemnity or guarantee from a P & I Club. This is not a situation relating to a bail bond, where the court may intervene in appropriate circumstances as borne out by case-law.

[24] As outlined in the Hong Kong decision of 'The Alacrity' by Barnett J:

> ... Historically, the practice of the court was that a defendant could only obtain release of a vessel by way of bail bond. See the *Christianborg* [1885] 10 PD 491. A bail bond was an undertaking to the court and represented the vessel itself. See *The Nied Elwin* [1811] Dods Adm 50. Additionally, a defendant could pay the amount of security claimed by a plaintiff into court. Since the 19th century, however, the practice has developed of the parties coming to a private arrangement between themselves, whereby a defendant gives security for a plaintiff's claim direct to a plaintiff by way of undertaking indemnity or guarantee given by a P & I Club or a bank. This practice has grown to the extent that bail is almost unheard of while payment into court is unusual.

[25] The foregoing reflects the position accurately in the courts in Malaysia today.

[26] Barnett J went on to note however that while the court retains a measure of jurisdiction over private security arrangements, notwithstanding statements to the effect that they are nothing to do with the court, this is in limited circumstances, for example the release of a vessel. In *"The Wladyslaw Lokietek"* [1978] 2 Ll LR 520 Brandon J released a security consisting of a written guarantee given by a third party but that case concerned limitation and s. 5 of the Merchant Shipping (Liability of Ship Owners and Others) Act 1958. And in *"The Andria"* [1984] 1 All ER 1126 the Court of Appeal released a letter of undertaking from a P & I Club because the arrest of the ship amounted to an abuse of the court's process.

[27] In situations where the arrest of a vessel was wrongful or where there was for some reason an abuse, it follows that a court may well discharge a private form of security upon release of the vessel. The entire basis for the provision of the private security was tainted or flawed and therefore discharge or cancellation of such an ineffective instrument is necessary. The jurisdiction of the courts to act in such situations is therefore clear. However it is an entirely different matter for the court to intervene in a consensually agreed private arrangement, at the behest of one party and to re-write the agreement between the parties. I can only echo the words of Brandon J in *"The Alacrity"* (above), namely that:

> ... It is no function of the court and, as I understand it, it has never been, to write a contract for parties before the court ... An in rem action confers a valuable albeit draconian, right upon a Plaintiff. I see no warrant for obliging that plaintiff to take an alternative form of security that he does not find acceptable and for which the party giving the security is not, as in the case of bail, immediately answerable to the court. I decline jurisdiction in the circumstances.

[28] In like vein the plaintiff here having agreed to the quantum of security in 2004, with the requisite knowledge and ability to assess the quantum of damages likely to arise, cannot now seek to have that sum varied upwards without the consent or agreement of the defendant and the third party providing such indemnity.

[29] I am borne out in reaching the aforesaid conclusion by the case of *Sadit Timber Sdn Bhd v. The "Ling Yung" and "Thai Yung", Owners & Ors* [1982] 1 LNS 116 where Chong Yik Liong J had occasion to consider whether the High Court had jurisdiction to substitute a new undertaking for the original undertaking at the request of the defendants in that case. In support of that contention, the defendants in that case relied, as is the case here on *"The Moschanthy"* (above). The learned judge dismissed the contention stating:

> ... With respect I do not see how this passage can support the submission that the Court has jurisdiction to substitute the new Undertaking for the original undertaking. What Brandon J. said in that passage, according to my understanding, amounts to this, that is, even if the amount of security in actions in rem has been agreed upon by the parties, the Court still has power to vary the amount where the amount is shown to be excessive, and it is certainly far from saying that the Court has jurisdiction to vary

A the agreed method of giving security or to substitute a different kind of undertaking for the undertaking previously agreed by the parties.

In *The Alletta*, it was held that the court has no jurisdiction to make an order releasing a security not given to the court and not
B taking the form of a bail bond under the provisions of R.S.C. Order 75, rule 16.

I am inclined to follow *The Alletta (supra)* in my approach to this question. I am of the view that where security in an action in rem is furnished by private agreement, such security can only be
C varied or substituted by mutual agreement of the parties or with the consent of the party affected by such variation or substitution. In the present case, the security by way of the original Undertaking was given to the Plaintiffs and not to the Court in the form of a bail bond as provided under our Rules of the High
D Court Order 70 Rule 15 (which is in *pari material* with the English R.S.C. Order 75, rule 16) and I fail to see how I have any jurisdiction to make the Order sought in this application.

[30] I respectfully agree and adopt the reasoning above. As stated
E by the learned judge and indeed by Brandon J in *"The Moschanthy"* and *The Polo II* (above) (which passage I have reproduced above) the power of the court to control and thereby vary or modify security arises from its inherent jurisdiction to prevent any abuse of the process of the court or the use of court
F procedure in an oppressive way. As such it is only to stop such abuse or oppressive conduct which may arise, for example where a plaintiff, when exercising the power to arrest seeks to utilise that power oppressively by demanding for extortionate sums of money that the court will step in its inherent admiralty jurisdiction to stop
G such abuse (as was the case in *"Inai Selasih"* (above). The court will act to stop such abusive or oppressive conduct.

[31] I do not find any such abusive or oppressive conduct arising in the instant case. The facts, which are not in dispute, show that the plaintiff and the defendant through their respective agents
H arrived at an agreed sum in 2004. The fact that the plaintiff was represented by an employee while the defendant was represented by solicitors makes no difference. This is because at the time the plaintiff had in its possession the ability to ascertain with reasonable precision the quantum and costs of the loss and
I damage it claimed to have suffered. The defendant did not possess that information.

[32] The plaintiff has now found that sum to be less than adequate. That in itself does not warrant interference by this court in the purported exercise of its inherent admiralty jurisdiction. This is because no abuse or oppression has been shown, which I accept to be the basis on which the court can, in a suitable case, intervene as explained above. This court cannot re-write or substitute the private third party security arrangement reached between the plaintiff and the P & I Club on behalf of the defendant.

[33] In these circumstances I am inclined to the view that the court lacks jurisdiction to intervene in this matter and grant the prayers sought. Accordingly the plaintiffs' application is dismissed with costs.